IN THE

# Supreme Court of the United States

OCTOBER TERM, 1948.

*No. 272*

ARTHUR TERMINIELLO,

*Petitioner,*

vs.

CITY OF CHICAGO,

*Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

## BRIEF OF THE AMERICAN JEWISH CONGRESS AS AMICUS CURIAE AND MOTION

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## MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

*To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

The undersigned as counsel for the American Jewish Congress respectfully moves this Court for leave to file the accompanying brief as Amicus Curiae.

The American Jewish Congress is an organization consisting of thousands of Americans of Jewish faith and ancestry. The issue presented to this Court in this case is the extent to which a professional agitator may go in fomenting hatred and violence against Jews without ex-

ceeding the bounds of freedom of speech. At the beginning of our brief we set forth the importance of the issue to American Jewry.

We have sought, but have been unable to obtain, the consent of counsel for the parties to the filing of this brief.

Dated: Chicago, Illinois, January 24, 1949.

Respectfully submitted,

BYRON S. MILLER,

*Counsel for American Jewish Congress.*

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## BRIEF OF THE AMERICAN JEWISH CONGRESS, AMICUS CURIAE.

### INTEREST OF THE AMERICAN JEWISH CONGRESS.

The American Jewish Congress was organized in part "* * * to safeguard the civil, political, economic and religious rights of Jews everywhere" and "* * * to help preserve, maintain and extend the democratic way of life."

In the three decades of its existence the American Jewish Congress, on frequent occasions, has represented the democratic interests of the Jewish people before the courts, legislatures and administrative tribunals of the State and

Federal governments. Its work, however, has never been confined to the interests of the Jewish people alone. It has believed, indeed, that Jewish interests are best served by strengthening the democratic operation of American institutions.

Freedom of speech, particularly freedom to espouse unpopular causes, is fundamental to the health of any society and particularly essential for the well-being of minority groups. That this freedom is not absolute is well established; but its limits appear shrouded in generalities. We believe that preservation of the vitality of freedom of speech requires that its boundaries be carefully delineated, lest its protections on the one hand be weakened by uncertainty of scope or on the other serve unwittingly to shelter the seeds of its own destruction by force. This further definition is particularly important where, as in the instant case, the speech involved was essentially an attempt to foment hatred of Jews.

For these reasons the American Jewish Congress is deeply concerned with the outcome of this case and is impelled to submit this brief *amicus curiae*.

## Statement.

Petitioner was arrested upon a sworn complaint, filed in the Municipal Court of Chicago, charging in the language of the Chicago ordinance that on February 7, 1946, petitioner did make or aid in making an improper noise, riot, disturbance, breach of the peace or diversion tending to a breach of the peace within the limits of the City in violation of chapter 193, section 1 (1) of the Revised Code of 1939, as amended.

Upon a trial with a jury, a verdict was returned finding him guilty and assessing a fine against him of $100. Judgment was entered upon the verdict.

Petitioner appealed directly to the Illinois Supreme Court but the cause was transferred to the Appellate Court. The Appellate Court, with one judge dissenting, affirmed. The Supreme Court of Illinois granted petitioner leave to appeal and thereafter unanimously affirmed the conviction.

Petitioner's conduct which gave rise to his conviction in this case is reviewed in considerable detail in the opinions of the courts below. Both state courts concluded that petitioner had created a diversion tending to several breaches of the peace. Both found petitioner's conduct clearly outside the pale of Constitutional protection under the First and Fourteenth Amendments.

## The Issues to Which This Brief Is Addressed.

The actions of defendant Terminiello as disclosed in the record in this proceeding merit the most severe condemnation that any man respecting the dignity of the individual can express. The issues presented to this Court, however, are considerably narrower than would be inherent in a moral judgment of Terminiello's behavior. It is submitted that upon the record before this Court, defendant's conviction should be affirmed upon a more precise delineation of the exceptions to freedom of speech than appear in the opinions of the courts below.

Before considering the precise propositions we believe to be before this Court, there may be some value in isolating the questions *not* present in this proceeding despite references to them at various points in the Record:

*First,* the argument has been made and even adopted by the Illinois Supreme Court in its opinion below that the defendant

> "by his conduct in scheduling an address in a large auditorium, invited a storm of protest. . . . Just as he

> drew his audience into the auditorium, he drew hundreds of his antagonists to the area adjacent to the hall. As related, the explosive situation thus created by defendant resulted in innumerable acts of violence . . . . The meeting was, indeed, a diversion tending to a breach of the peace." (R. 142-43.)

We believe this conclusion of the court below to be both in error and unnecessary to affirmance of Terminiello's conviction.

Freedom of speech would be sharply limited if the unpopularity of a speaker or his topic could make his calling of a meeting a breach of the peace even before he opened his mouth. If calling the meeting alone was an offense, then Henry Wallace could have been similarly prosecuted for scheduling a meeting in the heart of the South to attack racial discrimination.

*Second,* no question of "previous restraint" is present in this case. No claim is made that defendant was obliged to fulfill some unconstitutional requirement before being allowed to make his speech. Punishment for the speech itself *after* its delivery has never been considered a "previous restraint."

*Third,* the many libels contained in defendant's speech are irrelevant here. This is a prosecution for making or aiding "a diversion tending to a breach of the peace." In such a case all eyes must be focussed on the relationship between defendant's conduct and an actual or potential breach of the peace. Such a judgment takes no cognizance of the truth or falsity of defendant's remarks; indeed, it is easy to conceive of circumstances in which true remarks may be held to be a breach of the peace. A man accused of being a "dirty liar" may merit the accusation; but the accuser might nevertheless be subject to prosecution for breach of the peace.

*Fourth,* defendant's conduct in fomenting religious and political hatred insofar as they may lead to violence at some indefinite future time is not the ground for conviction here. Were this a prosecution under a statute aimed directly at the deliberate fomentation of racial or religious hatred, the poisonous propaganda of defendant's remarks would alone be cause for punishment. But the Illinois Supreme Court has held that the ordinance in question essentially adopts the common law offense of breach of the peace (*City of Chicago* v. *Hunt,* 374 Ill. 234), and indeed in its opinion below construed the ordinance to apply only to actual disturbances or incitation to *immediate* violence. Within the limited framework of this prosecution, then, the longer-range consequences of defendant's statements are not pertinent.

This discussion of related questions not involved in the present proceeding would be incomplete without a clear statement of the narrow issues we conceive to be before this Court.

We believe the conviction of Terminiello rests upon three separate and distinct bases, any one of which is sufficient to warrant affirmance. Enumeration of these grounds follows.

## Summary of Argument.

I. Defendant's conduct in addressing members of the audience as "scum" and "slimy scum" was alone sufficient to warrant the conviction below.

The use of "fighting" or "abusive" words has frequently been recognized by this Court as punishable without infringing upon freedom of speech.

II and III. Defendant's conduct was properly found by the courts below to constitute: (a) incitement of his

supporters in the audience to violence against the dissenters present in the auditorium; and (b) incitement of his supporters to violence against members of the group outside the auditorium.

Both courts below found sufficient evidence in the record to support jury findings that defendant's actions created a diversion tending to one or more breaches of the peace.

## ARGUMENT.

### Point I.

**Defendant's conduct in addressing members of the audience as "scum" and "slimy scum" was alone sufficient to warrant the conviction below.**

The conduct forming the basis for the prosecution in this case took place a scant five months after the end of World War II, a war fought to stem the forces of fascism. At a time when many American soldiers had not yet been demobilized from service in this war, defendant Terminiello deliberately chose to designate those in the audience who were not his "fellow Christians" as "scum" and as "slimy scum."

While counsel for defendant urges in his petition for *certiorari* that "nothing personal" was intended by Terminiello for the Jews in the audience, note must be taken that one of the factors leading the United States to declare war was the Nazis' systematic extermination of 6,000,000 Jews in Europe. With this destruction fresh in the minds of American Jewry, Terminiello is chargeable with knowledge that a vituperative attack explicitly aimed at Jews present in the audience would be interpreted by them as of a piece with Nazi anti-Jewish aggression. Though defendant did not single them out by name, Jews in the audience should reasonably have been expected to view Terminiello's revilings as a recurrence of the Nazi threat in their midst. The heightened sensitivity of Jews everywhere to Nazi vilification tactics is a factor which must weigh heavily with this Court in appraising the likelihood that defendant's "fighting words" would result in violence.

It is submitted that wholly without these special surrounding circumstances, calling people "scum" in their presence is the use of a fighting word which this Court has repeatedly held without the scope of protected speech. Manifestly, such a designation in the circumstances which here concern us assumes a doubly indefensible character.

The record clearly discloses that defendant intended these epithets for persons present *inside* the auditorium. Both times he described them as "the scum that got in by mistake." Nor was his use of the word "scum" any accidental slip of the tongue. In repeating the word "scum" he apparently felt its force as an epithet to be inadequately expressive for he added the equally vile adjective "slimy" to make as unlovely a characterization as any human being could imagine being exposed to. Even then, he was not satisfied that he had been sufficiently articulate for the sentence in which he used this double epithet was: "And nothing I could say tonight could begin to express the contempt I have for the slimy scum that got in by mistake."

This Court recognized the ineligibility of such epithets to the protection of the First Amendment when it said in *Chaplinsky v. New Hampshire*, 315 U. S. 568, at page 571:

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterances inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas,

and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

In the earlier case of *Cantwell* v. *Connecticut*, 310 U. S. 296, this Court enunciated the same doctrine:

> "One may, however, be guilty of the offense [of breach of the peace] if he commit acts or make statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, in practically all, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer. Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." (pp. 309-10.)

In the *Cantwell* case defendant had not resorted to epithets aimed at persons in his presence. His conduct in relation to his listeners was polite and respectful and he left quietly at their suggestion. Hence this Court concluded that a conviction was not proper.

In the case at bar, however, Terminiello himself admitted his statement was "intemperate." The Appellate Court below found the evidence sufficient to warrant the conclusion that he was a "professional agitator" and a "paid agitator." (R. 16-17).) The charged manner of his presentation is apparent from the rambling incoherence and vitriolic content of his opening remarks. Finally, the words used were directed at some of his listeners and involved the use of epithets clearly as reprehensible as those involved in the *Chaplinsky* case.

Indeed, in *State* v. *O'Donnell*, 200 Atl. (N. J.) 739, the New Jersey Supreme Court said:

> "With respect to the ordinary meaning of 'rat' and 'scum of the earth' when used as epithets, it is a matter of common knowledge that they are expressions of strong opprobrium. They imply baseness of character and vileness of mind, emotions and intentions. They are selected when one intends to be offensive. * * * 'Scum' (is defined) as 'refuse, off-scourings, anything vile or worthless, hence, vile or worthless persons; low people.' I am of the opinion that such epithets are clearly offensive."

This interpretation was expressly adopted by the Supreme Court below when it said (R. 143):

> "Plainly, they were derisive, fighting words likely to cause a breach of the peace by the addressee, words whose publication constitutes a breach of the peace by the speaker. (*Chaplinsky* v. *New Hampshire*, 315 U. S. 568.)"

It is submitted, therefore, that the judgment of the court below should be affirmed for the reason stated by that court (R. 143):

> "*Alone*, these epithets directed to certain members of the audience, constituted action tending to a breach of the peace." (Ital. added.)

## Points II and III.

**Defendant's conduct was properly found by the courts below to constitute: (a) incitement of his supporters in the audience to violence against the dissenters present in the auditorium; and (b) incitement of his supporters to violence against members of the group outside the auditorium.**

The precise offense in this case is making or aiding "a diversion tending to a breach of the peace." Apart from

Terminiello's use of abusive epithets or fighting words considered in Point I above, his conduct could not by itself be considered an actual breach of the peace. The sound of the speech itself was certainly no disturbance of the public order.

Rather, his conduct became an offense additional to that described in Point I only if defendant can be said to have *incited* some breach of the peace.

This Court has unmistakably held that incitement to a breach of the peace is not conduct falling within the protection accorded freedom of speech. In *Cantwell* v. *Connecticut*, this Court said:

> "No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious." (p. 308.)

Incitement to two separate breaches is set forth in the headnote; before discussing the breaches directly, let us review those aspects of defendant's conduct common to both of them.

**A. Analysis of the Evidence Relating to Incitement by Defendant.**

In appraising defendant's conduct to determine whether the jury had sufficient evidence upon which to base a finding of incitement, three factors have to be considered: (a) what the defendant said—the content and phraseology of his speech; (b) what defendant did—his demeanor and conduct in delivering the speech; and (c) the surrounding circumstances, to permit some evaluation of the reason-

ably anticipable consequences of defendant's words and acts.[1] Only the totality of these elements permits an evaluation of defendant's conduct in terms of its "incitement" effect.

Turning first to Terminiello's speech, we must look not alone at the separate statements on particular subjects but at the gross impression the speech was likely to have made on the audience. Without here attempting a content analysis of Terminiello's remarks, we believe certain specific inferences are apparent from a careful reading of the record if the reader projects himself into the auditorium that February night:

(1) *Content.* With one possible exception discussed below, the speech was designed solely for the fomentation of hatred. To accomplish this objective Terminiello resorted to the familiar propaganda technique of concentrating on two themes:

*First*, by instilling *fear* into the minds of his listeners

—by stories of persecution against himself and his cohorts,

—by dire forebodings of attack by Communist enemies,

—by telling Russian atrocity stories,

—by identifying the present United States Government as Communistic,

[1] It should be noted that we do not contend that defendant incited the audience to violence against himself, except of course as set forth in Point I above. Were that question considered by this Court, we should urge that freedom of speech requires that no speaker ever be convicted under a breach of the peace ordinance for inciting violence against himself as a result of what he says, unless he resorts to epithetical language. We do not however believe that genuine freedom of speech requires the invalidation of narrowly-drawn statutes aimed at speakers who deliberately foment racial or religious hatred. Such statutes would present issues not present in this case.

—by repeatedly warning of revolution,

—by quoting the late Chief Justice of this Court as saying the Constitution would be no protection,

—by warning of a plot to undermine the FBI, recognized as the nation's bulwark against subversive plots,

—by attributing to the present United States Government atrocities in shipping South American residents to Siberia, in starving pregnant women and little babies in Germany, in inoculating Germans with disease germs, and in committing mayhem against German men,

—by charging President Roosevelt with staging the Pearl Harbor disaster for the purpose of involving all Americans in warfare,

—by accusing Great Britain of sacrificing American soldiers, and

—by accusing Jews of violence against Christians and resorting to "an-eye-for-an-eye" philosophy to compensate for Nazi mass murder of Jews.

The very number and extremity of these "fear" stories, despite the sketchiness of their review here, should demonstrate the strength of emotional impact the speech was calculated to have.

*Second*, interspersed with these fear-arousing tales, Terminiello translated their meaning into unambiguous expressions of *hatred* which filled the audience's need for a psychological outlet for the apprehensions defendant had fostered and fed. Starting with epithets and strong expressions of contempt for non-Christians, he successively identified Communists as the enemy, then the present United States Government as Communists, and finally Jews again, this time as Communists.

In short, defendant's speech was designedly so constructed as to foment active and extreme hatred for and fear of Jews, Communists and New Dealers. Indeed, nowhere in the speech can any content be found which is not aimed at this objective.

(3) *Demeanor.* The manner in which Terminiello delivered his speech is apparent from much of its content. Speaking extemporaneously, he started with intemperate remarks, with irascible expressions of contempt. After telling of a coming revolution in which he linked Jews, Communists and New Dealers as the cause, he wound up with an exhortation to action in typical rabble-rousing terms. In rapid, semi-incoherent fashion he said:

> "It is time you Christian men and women decided that you have the unity which comes to you from truth, the unity which comes to you from union with Christ and union with one another. That unless you stand together today, not only America but your Christian heritage will be lost to you, be lost to your children, be lost to civilization . . . We must all be like the Apostle before the coming of the Holy Ghost. We must not lock ourselves in an upper room for fear of the Jews. I speak of the Communistic Zionistic Jews, and those are not American Jews. We don't want them here; we want them to go back where they came from. We are going to stand one and all together and form a solid phalanx of courage and loyalty and strength and oppose every attempt to breach freedom of speech in America, every attempt to dilute Christianity in America, every attempt to undermine the morality of America, every attempt to shed American blood to promote Zionism in America, every attempt to demoralize our America, every attempt to persecute our cross, every attempt to destroy the sovereignty of America by union with other countries of the world, giving up our own sovereignty."

Much is made by counsel for defendant of Terminiello's verbal exhortations to the audience to restrain themselves. The Supreme Court below characterized these remarks as "double talk," quoting from Terminiello's speech:

> "They [the mob] are being led. There will be violence. That is why I say to you, men, don't do it. Walk out of here dignified. The police will protect you. We will not be tolerant of that mob out there. We are not going to be tolerant any longer. We are strong enough. We are not going to be tolerant of their smears any longer. We are going to stand up and dare them to smear us. We are not going to be tolerant any longer of their pagan eye-for-an-eye philosophy."

The Appellate Court below, which under Illinois procedure is the principal reviewer of the evidence, similarly concluded:

> "If the jury, who saw and heard the defendant testify, concluded that he was not sincere in those statements, that it was a familiar trick of speech, used by experienced and professional agitators for their own protection, then such statements cannot overcome the appeal to fury, emotion, and disorder, which the rest of the speech, as already pointed out, accomplished, and the jury could well reject the claim of good faith made for the defendant."

It is submitted that the record contains sufficient evidence to support the conclusion of the triers of fact, who had the opportunity of seeing and evaluating the witnesses, that these exhortations were shallow devices designed to create the appearance of restraint but intended to be submerged in the wave of violent emotional reaction induced by the bulk of the speech.

(3) *Surrounding Circumstances.* For Terminiello to have been guilty of inciting to a breach of the peace, he

must be shown to have had reasonable notice of the surrounding factors which might determine the effect of his speech upon his audience. Manifestly, if his entire audience had been Jewish, his speech could not be interpreted as incitement to immediate violence against Jews. Most of his audience, however, were not only not Jews but were apparently anti-Semitic, as appears from their comments during the speech. That Terminiello knew their make-up is apparent from his own testimony when he describes them as "my people" (R. 116). And he testified:

> "The audience would know it was the same type of person who is trying to undermine the country. I did not assume the audience knew something that I was not telling them." (R. 117.)

Also, the record is clear that he knew of the presence of Jews in the audience when he described them as "the scum that got in by mistake." His testimony indicated further that he considered the mob outside to be communists (R. 118) and that he knew the group included Jews (R. 116-17).

* * * *

It appears therefore that defendant's speech was a clear and deliberate fomentation of hatred against Jews and Communists, among others; that he called for action to express that hatred with the knowledge that there were Jews in the audience and the belief that there were Jews and Communists immediately outside.

Let us now review his conduct in the full setting of its known impact upon the audience during the giving of the speech.

**B. Defendant Incited His Supporters in the Audience to Violence Against the Dissenters Present in the Auditorium.**

The opinions of the courts below review in some detail the evidence bearing upon the audience reaction during the course of Terminiello's speech. Plaintiff's witnesses testified that the audience was disturbed and angry (R. 64); that the audience howled, hooted, and shouted violently at various points in the speech; that the shouts included: "Kill the Jews"; "The Jews are all killers and murderers. If we don't kill them first, they will kill us"; and "The Jews, 'niggers' and Catholics would have to be gotten rid of." Though some of defendant's witnesses testified to the contrary, the Appellate Court below concluded:

> "Whether these witnesses heard what they claimed in their testimony, and how much reliance could be placed upon their testimony, was clearly within the province of the jury, who heard and saw all the witnesses. It is not for us upon this record to suggest that the jury should have believed the witnesses for the defendant and not those for the plaintiff, especially when there is so little conflict upon material matters. As we have pointed out, there is much corroboration of the plaintiff's witnesses as to what they heard and saw of the happenings on the outside and inside of the meeting hall." (R. 14.)

In order to evaluate Terminiello's conduct in terms of incitement, attention must be directed to the timing of his speech in relation to the audience reaction.

First, the evidence indicates that his opening remarks started off the noisy reaction from the audience (R. 64). Thus, defendant knew almost from the beginning that his audience was excited and angry at Jews. Then, far from toning down his remarks, he proceeded with "opprobrious, abusive and insulting stories" (R. 143), yielding the ex-

plicit shouts about "killing the Jews before they kill us." Indeed, defendant himself confirmed both the audience reaction and his awareness of it when he testified that *a member of the audience prompted him* to tell the story of Jewish nurses inoculating Germans with disease germs.[2] (R. 114.) Finally, either ignoring or counting on the "feverish feeling of anger and hatred" (Supreme Court below, R. 143), he wound up his speech with the most militant ranting imaginable, using the phrases quoted in A above. The direction of this feeling against dissenters in the audience is demonstrated by one witness' testimony that one man was ejected from the hall at the instance of a number of women in the audience. (R. 13, 64.)

It is submitted, therefore, that the Supreme Court below was warranted in concluding that

> "Upon the record made, the jury was entitled to believe that defendant's utterances incited an actual breach of the peace within the auditorium." (R. 143.)

The breach of the peace here referred to was the incitation of his followers in the audience to immediate violence against the dissenters whose presence was expressly recognized by defendant and communicated to his supporters.

**C. Defendant Incited His Supporters in the Audience to Violence Against Members of the Group Outside the Auditorium.**

To the previous resumé of the record there need only be added the evidence bearing on the direction, at defendant's incitation, of the audience's anger against the group

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[2] The transcript reports this story in somewhat garbled form but defendant identified non-Christian nurses as the culprits in his own testimony when he said: "He said that non-Christian doctors and non-Christian nurses were doing these things." (R. 118).

outside the hall. Both courts below explicitly found defendant guilty on this score.

The Appellate Court singled out defendant's express reference to the outside group, saying:

> "' * * *and millions more through Eastern Europe at the close of the war are being murdered by these murderous Russians, hurt, being raped and sent into slavery. *That is what they want for you, that howling mob outside.'* If these statements, coupled with the rest of his speech, are not an appeal to fury and an incitement to disorder and violence, then these words lose their English meaning." (R. 15.) (Ital. added.)

The Supreme Court below concluded:

> "His speech tended to incite the majority of his audience to immediate violence against the angry mob outside."

That the audience did not actually engage in violence against the group outside is irrelevant so long as the record supports the conclusion that defendant incited his listeners to such violence and a real danger of its occurrence resulted. In the *Chaplinsky* case this Court upheld the conviction involved even though no actual violence ensued.

## CONCLUSION.

The disposition of this case will afford this Court its first opportunity in several years to delineate further between protected speech and speech so infused with violence as to be outside the shield of the First and Fourteenth Amendments.

It is submitted that the instant case, however, falls neatly into the established exception of speech which is

essentially incitation to immediate violence. Three separate and distinct offenses are present here, any one of which is alone sufficient to support the conviction. They are:

(1) Defendant created a diversion tending to a breach of the peace by calling members of the audience "scum" and "slimy scum", thereby using "words whose speaking constitutes a breach of the peace by the speaker." *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, at 573.

(2) Defendant created a diversion tending to a breach of the peace by inciting his supporters in the audience to immediate violence against the dissenters in the auditorium.

(3) Defendant created a diversion tending to a breach of the peace by inciting his supporters in the audience to immediate violence against the group outside the auditorium.

For these reasons we urge this Court to affirm the conviction below.

Respectfully submitted,

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